

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BRANDI L. SCROGGIN**  
Claimant

VS.

**HEARTLAND PARK RACEWAY, LLC.**  
Respondent

AND

**ACCIDENT FUND INS. CO. OF AMERICA**  
Insurance Carrier

Docket No. 1,051,858

**ORDER**

**STATEMENT OF THE CASE**

Attorney Frank Taff requested review of the June 4, 2012, Order entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on October 9, 2012. The Director appointed E. L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member David A. Shufelt. Frank Taff, of Topeka, Kansas, appeared on his own behalf. William G. Manson, of Kansas City, Missouri, appeared for Adler & Manson, L.C. Katie M. Black, of Kansas City, Kansas, who is the attorney for respondent and its insurance carrier, did not file a brief or participate in oral argument.

The Administrative Law Judge (ALJ) found that Frank Taff was entitled to attorney fees in the total amount of \$1,350. The remaining attorney fees in the amount of \$4,275 were awarded to Adler & Manson, L.C.

**ISSUES**

Frank Taff requests review of the ALJ's division of the attorney fees in the case. Mr. Taff agrees with the ALJ's finding that he is entitled to compensation for all the time listed on his Statement of Time and Expenses, that being nine hours. However, in his brief, Mr. Taff asks the Board to find that he is entitled to be compensated at his hourly rate of \$250 per hour rather than at the \$150 rate as awarded by the ALJ. During oral

argument to the Board, Mr. Taff amended his request to \$200 per hour to be consistent with the hourly rate requested by claimant's subsequent counsel, Adler & Manson, L.C.

Adler & Manson, L.C., asks the Board to affirm the ALJ's division of attorney fees.

The issue for the Board's review is: How should the attorney fees in this case be divided between the claimant's former attorney and her current attorney?

#### **FINDINGS OF FACT**

On August 2, 2010, Brandi L. Scroggin (claimant) signed an attorney fee contract hiring Frank Taff to represent her in a workers compensation claim. During the time claimant's case was handled by Mr. Taff, the application for hearing and various other pleadings were filed on her behalf. An application for preliminary hearing was filed, and Mr. Taff met with claimant to prepare for the preliminary hearing. Mr. Taff appeared at the preliminary hearing, and other correspondence was prepared and sent to counsel for respondent. On or about February 28, 2011, claimant hand-delivered a letter to Mr. Taff discharging him from further handling of her claim. Claimant testified at the hearing on the motion on attorney fees that she felt the matter was going nowhere and decided to find an attorney to "get things completed in a timely manner."<sup>1</sup>

After being discharged, Mr. Taff filed an attorney fee lien on any recovery in claimant's workers compensation claim. The lien set out that Mr. Taff had expended nine hours of time on behalf of claimant during the time he was involved in the claim. Mr. Taff asked for reimbursement of the nine hours time at the rate of \$250 per hour.

On March 25, 2011, claimant signed an attorney fee contract with Adler & Manson, L.C. During Mr. Manson's involvement in this claim, he authored various pleadings and correspondence, conferred with claimant, attended claimant's deposition, arranged for claimant to be seen by a medical expert and a vocational rehabilitation expert, and entered into settlement negotiations. Adler & Manson, L.C. entered into evidence an invoice showing its professional services and time, which amounted to 21.75 hours. Adler & Manson, L.C. computed its time at the rate of \$200 per hour. It also requested reimbursement of \$3,472.88 in expenses, which included expert witness fees of \$2,750. The Division records show the case was settled for \$22,500 on May 21, 2012, and attorney fees were awarded in the amount of \$5,625.

At the hearing on the Motion on Attorney Fees, claimant testified that she had only spent 20 to 30 minutes with Mr. Taff at their initial meeting and also believed Mr. Taff spent under 10 minutes completing the paperwork involved in getting her claim filed. Claimant also testified concerning other items on Mr. Taff's invoice that she believed overstated the

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<sup>1</sup> Motion Hearing Trans. (May 9, 2012) at 10.

amount of time he spent. Claimant agreed with the time included on the invoice submitted by Adler & Manson, L.C.

### PRINCIPLES OF LAW

The attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the disability compensation recovered.<sup>2</sup> Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.<sup>3</sup>

The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.<sup>4</sup> The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 44-536(b), which specifically includes:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney . . .
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and<sup>5</sup>
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

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<sup>2</sup> See K.S.A. 44-536(a).

<sup>3</sup> See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

<sup>4</sup> K.S.A. 44-536(h).

<sup>5</sup> See Kansas Rules of Professional Conduct 1.5 (Fees) (2010 Kan. Ct. R. Annot. 458).

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.<sup>6</sup>

In *Madison*,<sup>7</sup> the Kansas Court of Appeals ruled that attorneys who are discharged before the contingency provided in a contingency fee contract may not, generally, recover the contingency fee. Instead, the fees are to be determined based upon the reasonable value of the services the attorney has rendered, or under *quantum meruit*. And in that same opinion, the Kansas Court of Appeals cited both *In re Phelps*<sup>8</sup> and *Shouse v. Consolidated Flour Mills Co.*<sup>9</sup> as establishing a similar rule when attorneys are discharged before completing the contracted services for stipulated attorney fees.

The reasonableness of an attorney fee award which is not based on a contingency fee must be viewed in light of the amount of the compensation collected in addition to the reasonable and customary charges in the locality.<sup>10</sup>

#### **ANALYSIS AND CONCLUSION**

Mr. Taff argues that his nine hours of time should be paid at the rate of \$200 per hour or \$1,800, which Mr. Taff contends is a reasonable and customary rate. Mr. Manson does not dispute that \$200 is a reasonable and customary rate, but claimant questions whether Mr. Taff actually incurred that much time working on her claim. Mr. Manson suggests that Adler & Manson actually spent more time than what its itemized statement provides. Considering the amount of attorney fees collected, Adler & Manson believes the apportionment made by the ALJ is reasonable. The Board agrees. Although neither attorney received what they argued would constitute a reasonable and customary fee if their time was billed and paid on an hourly basis, the apportionment closely approximates a proportionate percentage of the total fees. Given the amount collected and the fact that the contingency occurred during the period of representation by Adler & Manson, the ALJ's award was reasonable and appropriate.

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<sup>6</sup> *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, Syl. ¶ 5, 663 P.2d 663 (1983).

<sup>7</sup> *Madison*, 8 Kan. App. 2d at 579.

<sup>8</sup> *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970).

<sup>9</sup> *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931).

<sup>10</sup> *Hatfield v. WalMart Stores, Inc.*, 14 Kan. App. 2d 193, 786 P.2d 618 (1990).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated June 4, 2012, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank Taff, on his own behalf  
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Rebecca A. Sanders, Administrative Law Judge